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No. 9682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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ADOLPH B. SPRECKELS,	<i>Petitioner,</i>
VS.	
COMMISSIONER OF INTERNAL REVENUE,	<i>Respondent.</i>

PETITIONER'S OPENING BRIEF.

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## PETITIONER'S OPENING BRIEF.

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### OPINION BELOW.

This is a petition for review of a decision of the Board of Tax Appeals entered pursuant to findings of fact and an opinion of the Board reported in 41 B. T. A. p. 1204.

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### STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

Petitioner is an individual, resident in San Francisco, California. He filed his income tax return for the year 1934 with the Collector at San Francisco. (R. 24) On July 20, 1938, the respondent sent petitioner a ninety day letter proposing to assess additional income taxes for that year. (R. 9-14) On September 26, 1938, and within the time allowed by law,

petitioner appealed from said proposed assessment to the Board of Tax Appeals. (R. 2, 14) After a hearing the Board filed its findings of fact and opinion and on August 5, 1940, a decision was entered determining that there had been an overpayment of petitioner's income tax for the calendar year 1934 in the sum of \$2,816.72. (R. 34) Petitioner, deeming himself entitled to a refund in the sum of \$4,087.61, on October 19, 1940, filed with the Board his petition for review of the decision by this Court. (R. 3, 38)

The Board had jurisdiction of the appeal under section 272 (a) of the Revenue Act of 1938 and section 272 (a) of the Internal Revenue Code. This Court has jurisdiction of the petition for review under sections 1141 and 1142 of the Internal Revenue Code.

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#### ABSTRACT OF CASE.

Petitioner filed his federal income tax return for 1934 on May 9, 1935, showing a net taxable income of \$121,593.86 and a tax liability of \$37,897.60, which was paid in installments, the last payment being made on December 16, 1935, in the amount of \$9,474.40. (R. 24-25) On December 23, 1937, petitioner filed a timely claim for refund of income tax in the amount of \$4,087.61 on the ground that certain stamp taxes had been paid that had not been claimed as deductions in the return. (R. 25) Thereafter respondent audited petitioner's return in conjunction with the refund claim and in a deficiency letter dated July 20, 1938, conceded the correctness of the claim with respect to



the stamp taxes with the exception of \$80 thereof. However, respondent claimed that petitioner's dividend income had been understated by an amount considerably in excess of the stamp taxes paid and asserted a deficiency of \$1,254.11 for the year. (R. 9-14) In due time, on September 26, 1938, a petition for redetermination was filed with the Board wherein error was assigned as to the proposed increase in petitioner's dividend income and petitioner asserted his right to a deduction for the stamp taxes covered by the refund claim of December 23, 1937. (R. 4-8) At the hearing before the Board on June 8, 1939, petitioner asked and was granted leave to file an amendment to his petition setting forth an additional error on the part of the respondent in failing to allow petitioner a deduction for selling commissions paid in connection with sales of stocks, bonds and commodities in the sum of \$23,909.29. The amendment closed with a prayer for the refund of the \$4,087.61 claimed in the refund claim filed on December 23, 1937, although the allowance of the additional deduction for selling commissions would have authorized a refund in excess of \$15,000. (R. 18-20)

The Board after receiving testimony held that the selling commissions were legally deductible in determining petitioner's income tax liability with the result that petitioner had in fact overpaid his income tax for the year 1934 by \$15,122.56. However, on the ground that the amendment assigning error in respect to the deduction for selling commissions had not been filed within three years after the payment of the last installment of tax, the Board ruled that peti-

tioner could not receive the full amount of \$4,087.61 covered by the valid refund claim filed on December 23, 1937, but that the refund should be limited to \$2,816.72, the amount by which petitioner had overpaid his income tax for the year if the error with reference to the allowance of selling commissions were disregarded.

The sole question involved on this petition for review is whether the Board of Tax Appeals, having determined that a taxpayer has overpaid his income tax, may limit the amount of such overpayment to be refunded, to an amount less than that covered by a valid and timely refund claim, on the ground that one of the adjustments contributing to the determination that there was an overpayment was not specified as error within three years after the payment of the last installment of tax.

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#### **SPECIFICATIONS OF ERROR.**

Petitioner specifies the following errors on this petition for review:

(1) The failure of the Board to determine the amount by which petitioner overpaid his income tax for the year 1934, on the basis of the evidence before the Board;

(2) The failure of the Board to determine the portion of the overpayment of petitioner's income tax for 1934 paid within three years of the filing on December 23, 1937, of his claim for refund of income tax for that year.

**SUMMARY OF ARGUMENT.**

It is petitioner's position that the statute requires the Board, when it finds that a taxpayer has made an overpayment of tax for a year under consideration, to determine the amount of such overpayment without reference to any limitations on the right to refund, and, having so determined, then to determine the portion of the overpayment paid within three years before the filing of a valid claim for refund or of the petition. The matter of refund then becomes the function of the Bureau of Internal Revenue.

Petitioner also contends that the Board in performing its first function, that of determining the amount of the overpayment, is required to consider all errors specified in the petition and in any amendments thereto which the Board has permitted to be filed, regardless of the date of the filing of such amendments.

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**ARGUMENT.****I. STATEMENT OF FACTS AND POINTS OF LAW TO BE DISCUSSED.**

The Board of Tax Appeals has found facts from which it appears that petitioner has overpaid his income tax for the year 1934 by \$15,122.56. It has determined that petitioner is entitled to a refund of but \$2,816.72 of this overpayment. Petitioner does not assert the right to recover the full amount of the overpayment *but only so much thereof as is covered by a valid and timely refund claim for \$4,087.61.*

The statute provides that the Board, if it "finds that the taxpayer has made an overpayment of tax, \* \* \* shall have jurisdiction to determine the amount of such overpayment", and that when the decision of the Board has become final the amount of overpayment shall "be credited or refunded to the taxpayer". The only limitation on this jurisdiction is that the Board must determine the portion of the tax "paid within three years before the filing of the claim [for refund] or the filing of the petition, whichever is earlier". Revenue Act of 1934, section 322(d); Internal Revenue Code, section 322(d).

Petitioner contends that under these statutory provisions the Board has two duties to perform in a case where it finds that a taxpayer has overpaid his income tax, viz.: (1) to determine the amount of such overpayment, (2) to determine how much of such overpayment was paid within three years before the filing of a valid claim for refund or before filing the petition with the Board.

The Board in the present case performed neither of these duties. It not only failed to find the entire amount by which petitioner had overpaid his income tax for the year, a matter that can, however, be computed from the record before this Court, but it also erroneously determined that but \$2,816.72 of tax had been "paid within three years before the filing of a claim for refund", whereas the undisputed fact is that \$9,474.40 in tax had been paid within three years prior to the filing of the refund claim for \$4,087.61 on December 23, 1937.

Petitioner contends that under these statutory provisions the practice adopted by the Bureau of Internal Revenue in determining the amount of an overpayment of income tax properly refundable should apply, and that as required by General Counsel's Memorandum 9800, Cumulative Bulletin X-2, p. 271, "the correct tax should be calculated \* \* \* taking into consideration all items increasing and decreasing net income regardless of the statute of limitations"; and that after this is done, the tax paid should be refunded "to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary". (From the syllabus)

Thus considered, the petition for review does not present the question discussed in the Board's opinion as to the right to a refund by reason of an error in the determination of his tax first assigned in an amendment to the petition filed more than three years after the overpayment of tax, since petitioner throughout the case has not asserted any right to a refund in excess of the amount covered by the timely refund claim. Hence, the sole question for consideration is whether or not, in the case of an overpayment of income tax, the Board is authorized to reduce the allowable refund to an amount less than that covered by the timely claim.

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## II. THE PLEADINGS BEFORE THE BOARD.

For a proper understanding of the situation the pleadings before the Board will be reviewed.



**(a) THE 90-DAY LETTER.**

Petitioner's return for the year 1934 reported a taxable income of \$121,593.86. In his notice of determination of deficiency (the 90-day Letter, so-called) respondent increased petitioner's share of certain dividends received from trustees by \$9,431.67, disallowed a deduction of \$700.80 for taxes paid on whiskey withdrawn from bonded warehouse, and allowed as a deduction not claimed on the return but claimed in the refund claim filed December 23, 1937, an amount representing stamp taxes paid on sales of securities and commodities. The result was an increase in taxable income to \$124,507.04 and a proposal to assess a deficiency of \$1,254.11. (R. 9-14)

**(b) THE PETITION TO THE BOARD.**

In his petition for a redetermination of this deficiency, petitioner assigned as error the action of respondent in increasing his dividend income by \$9,431.67 (R. 5), and then pleaded in detail the facts concerning the payment of the stamp taxes on sales of securities and commodities, set out the dates of the payment of income tax for the year 1934, alleged the payment of an installment of \$9,474.40 on December 10, 1935, and the filing on December 23, 1937, of the refund claim for the overpayment of income tax arising from the failure to deduct the stamp taxes on the original return. (R. 6-7) The respondent's answer raised issues as to the errors specified, but admitted that petitioner was entitled to a deduction of \$7,219.29 for stamp taxes. (R. 15-17)

**(c) AMENDMENT TO PETITION.**

At the hearing before the Board in San Francisco on June 8, 1939, the errors raised in the original petition were disposed of by stipulation to the effect that \$7,828.51 should be excluded from taxable income as redetermined by the respondent and the dividend credit reduced by the same amount. (R. 23-25) This resulted in an overpayment of tax, since the deficiency letter proposed a net increase in taxable income of but \$2,913.18. Petitioner then moved for and was granted leave to file an amendment to his petition. (R. 2, 17-18, 21) The amendment to petition assigned an additional error in respondent's determination of income tax through his failure to allow as a deduction the sum of \$23,909.29 representing selling commissions paid in connection with the sales of stocks, bonds and commodities and alleged facts supporting the assignment. (R. 18-20) The respondent filed an answer to amendment to petition consisting of a general denial of the material allegations but containing no affirmative pleading setting up any bar of the refund by reason of the limitations of the statute. (R. 21-22)

**(d) THE HEARING.**

The hearing was confined to the issue raised by the amendment to petition and resulted in a finding by the Board that during the year 1934 petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit and that in that year he paid to brokers \$23,692, representing selling commissions in connection with such sales; that petitioner did not deduct the selling commissions in com-

puting the income shown in his income tax return for the taxable year, and that on petitioner's books the selling commissions were deducted from the selling price before net profit or loss was determined. (R. 24)

The Board also found that the last installment of petitioner's income tax for the year 1934 was paid on December 16, 1935, in the amount of \$9,474.40 and that on December 23, 1937, petitioner filed a claim for refund of income tax in the amount of \$4,087.61 on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. (R. 24-25)

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**III. THE BOARD ALTHOUGH FINDING PETITIONER HAD OVERPAID HIS INCOME TAX, FAILED TO DETERMINE THE AMOUNT OF OVERPAYMENT, OR THE AMOUNT PAID WITHIN THREE YEARS OF THE FILING OF A VALID REFUND CLAIM.**

**(a) THE DECISION.**

Notwithstanding the pleadings and findings the Board entered its decision,

“That there is an overpayment in income tax for the year 1934 in the amount of \$2,816.72, which amount was paid within three years before the filing of a claim for refund. (Section 809(a) Revenue Act of 1938.)” (R. 34)

**(b) OPINION OF THE BOARD.**

- (i) Board in effect considered itself limited to a consideration of errors assigned within statutory period for refunds.

The opinion of the Board (R. 26-31) shows that it reached its decision on the theory that it could not



allow a refund of any amount in excess of that resulting from the stipulation at the hearing, since the error in relation to the deduction of selling commissions was not assigned until more than three years after the payment of the last installment of the income tax. The Board felt constrained to this conclusion by the decisions of the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Rieck*, 104 Fed. (2d) 294, and of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Dallas*, 110 Fed. (2d) 743, stating that it found no material distinction between the situations in those cases and in the present case.

Before analyzing and showing the inapplicability of the two decisions to the present facts, it will lend to a clearer appreciation of the problem if the statutory provisions relating to the jurisdiction and procedure of the Board are considered.

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**IV. THE STATUTE REQUIRES THE BOARD TO DETERMINE SEPARATELY THE FULL AMOUNT OF OVERPAYMENT AND THE PORTION PAID WITHIN THREE YEARS OF THE REFUND CLAIM.**

**(a) STATUTORY PROVISIONS.**

The statutory provisions authorizing appeals to the Board and regulating procedure therein have not changed substantially under the various Revenue Acts and are now found in the Internal Revenue Code. So far as is necessary for a consideration of the present question, they read as follows:

Section 272. *Procedure in General.*

“(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed, \* \* \* the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final.

\* \* \* \* \*

“(b) *Collection of Deficiency found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

\* \* \* \* \*

“(e) *Increase of Deficiency after notice mailed.*—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether

any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.”

Section 322. *Refunds and Credits.*

“(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

“(b) *Limitation on Allowance.*

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of Credit or Refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

“(c) *Effect of Petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of

deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except:

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

“(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that such portion

was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency.”

Section 1111. *Rules of Practice, Procedure, and Evidence.*

“The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in the courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of the courts of equity of said District.”

**(b) NO JURISDICTIONAL LIMITATIONS ON MATTERS TO BE CONSIDERED BY BOARD IN REDETERMINING A DEFICIENCY.**

It is evident from the foregoing statutory provisions that there is no jurisdictional limit on the matters to be considered by the Board in redetermining a deficiency, provided only the petition is filed within the ninety-day period. The Commissioner is not even restricted to the errors raised by his deficiency letter. The only requirement for the assignment of errors by the petitioner is found in Rule 6 of the Board, specifying the contents of the petition and which, so far as that requirement is concerned, reads:

“(d) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. Issues in respect of which the burden of proof is by statute placed



upon the Commissioner will not be deemed to be raised by the petitioner in the absence of assignments of error in respect thereof. Each assignment of error shall be numbered.”

(c) RULES PERMIT AMENDED PLEADINGS.

Rule 17, provides:

“Amended and supplemental pleadings.—The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed, a petition may be amended only by consent of the Commissioner or on leave of the Board.

“All motions to amend, made prior to the hearing, must be accompanied by the proposed amendments or amended pleading.

“Upon motion made, the Board may, in its discretion, at any time before the conclusion of the hearing, permit a party to a proceeding to amend the pleadings to conform to the proof.

“When motions to amend are granted at the hearing, the amendment or amended pleading shall be filed at the hearing or with the Board within such time as the Division may fix.”

It follows logically from the policy announced in Rule 17, in view of the fact that the object of the creation of the Board was to afford an opportunity for a determination of the correct tax liability, that the Board may consider any error assigned by either party in the pleadings upon which the appeal is tried.

**(d) ERRORS RAISED BY AMENDMENT AT HEARING MUST BE CONSIDERED IN DETERMINING TAX LIABILITY.**

Prior to the present decision, it has been the regular practice of the Board to allow amendments for the purpose of assigning additional errors in the Commissioner's determination and to consider those additional errors in determining taxpayer's income.

*Appeal of Bear Manufacturing Co.*, 2 B. T. A. 422;

*Appeal of Chicago Railway Equipment Co.*, 13 B. T. A. 471, 480.

While neither of these appeals involved overpayments of tax, there is no reason why any exception should be made where a consideration of the error raised by the amendment will result in an overpayment rather than a reduction in the asserted deficiency as will be discussed in more detail later in this brief.

**(i) Procedure in Bureau of Internal Revenue under G. C. M. 9800 gives full effect to timely refund claims.**

As has been noted, prior to the present decision, the practice in the Bureau of Internal Revenue in auditing returns had been in accord with the rule petitioner contends is required of the Board by the statutory provisions relating to overpayments found by that body, viz.: determine the correct tax liability on the basis of all facts affecting the same, then determine the amount of refund, which cannot be more than the amount of overpayment actually made, nor more than the amount covered by a timely refund claim. General Counsel's Memorandum 9800, *supra*, discusses the problem in the terms of the 1926 Act, which are for

all purposes of the present consideration substantially identical with those of the 1938 Act here involved, as follows:

“Some doubt has arisen as to the legality of offsetting additional deductions (which are entirely proper and allowable except for the fact that they are not covered by a claim for refund or credit and for that reason could not be allowed if considered separately) against additions to income to the extent that such additions will permit an offset. \* \* \*

“The matter appears to be controlled by the express language of the statute. Section 284 (a) of the Revenue Act of 1926, so far as material, directs that ‘Where there has been an overpayment of any income \* \* \* tax \* \* \* the amount of such overpayment shall \* \* \* be credited against any income \* \* \* tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.’ Subdivision (b) 1 and 2 of section 284 provides:

“(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

“(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim



was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

“These provisions require no complicated calculations. Plainly the purpose is to permit the refund or credit of overpaid tax where a claim is required, to the extent of the allowable items covered by the claim. The statute does not make the adjustment of overpaid tax a matter of setting off one income-adjusting item or class of items against another. The statute looks simply to (1) the correct tax ascertained by inclusion of all proper items, regardless of time limitations, and (2) the tax actually paid no matter how calculated, and contemplates that the excess of (2) over (1) shall be refunded or credited to the extent of the tax overpaid represented by the allowable items covered by timely claims when claims are necessary.” (C. B. X-2, pp. 272-3)

The opinion concludes:

“Lewis et al. v. Reynolds (48 Fed. (2d) 515, Ct. D. 347, C. B. X-1, 180), decided by the United States Circuit Court of Appeals, Tenth Circuit, is not contrary to this conclusion. The court, after quoting section 284(a) of the Revenue Act of 1926, supra, and section 322 (a) and (b) of the Revenue Act of 1928, stated:

“The above-quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen,

the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.

“The inference of the court’s statement that the taxpayer is not entitled to a refund unless he has overpaid his tax seems plainly to be that if he has overpaid his tax he is entitled to a refund. The court recognized that in order to ascertain whether there has in fact been an overpayment of tax, items of income which increase the tax must be considered as well as items of deductions which decrease the tax. The court’s opinion affords no basis for assuming that the tax and overpayment may be computed to the detriment of the taxpayer by including one class of items and excluding the other class.

“It is therefore, concluded that in determining whether there has been an overpayment which may be refunded or credited, the correct tax should be calculated on the basis upon which the taxpayer filed his return, taking into consideration all items increasing and decreasing net income, regardless of the statute of limitations. The tax actually paid may be refunded or credited to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary.” (C. B. X-2, p. 274)

**(ii) Commissioner v. Rieck and Commissioner v. Dallas not inconsistent.**

When the facts involved in *Commissioner v. Rieck* and *Commissioner v. Dallas*, *supra*, are considered, the decisions are in nowise inconsistent with G. C. M. 9800 or with the construction of section 322 of the Internal Revenue Code, urged by petitioner. In truth,

if the procedure announced in G. C. M. 9800 is applied to the situations presented in the two cited cases, the result is the same as that reached by the Circuit Courts of Appeals, since while in each case there was an actual overpayment of tax, in neither was there a *valid, timely* claim for refund.

In the *Rieck* case, the taxpayer had made a timely petition to the Board wherein he claimed a refund of income tax on account of the improper inclusion in taxable income of income from an insurance trust. In the course of his appeal to the Board he "became convinced that his claim \* \* \* was baseless and would not be, as it was not, allowed by the Board. He accordingly asked and was granted by the Board leave to amend his claim by substituting for the Insurance Trust income deduction a deduction for the Bank stock loss. This amendment was allowed September 28th, 1936. The significance of this is that the original claim was filed April 19th, 1935, within two years of the payment of the tax. The amended claim was not made until September 28th, 1936, more than two years after the payment." (104 Fed. (2d) 294)

The Circuit Court of Appeals held the refund could not be allowed, applying to a petition to the Board, the rule that a refund claim cannot be amended after the statutory period to set up a new and distinct ground for recovery, citing *United States v. Andrews*, 302 U. S. 517, 82 L. Ed. 398, and *United States v. Garbutt Oil Co.*, 302 U. S. 528, 82 L. Ed. 405. It will be noted on examination of these two authorities, that

each, as did the *Rieck* case, involved amendments bringing in new and entirely unrelated claims, in support of *invalid* claims previously asserted.

In the case of *Commissioner v. Dallas, supra*, the original petition had made no claim of overpayment, only opposing a proposed increase in income, the first claim of overpayment being asserted in an amended petition filed more than two years after the payment of the tax, asserting the improper inclusion of an item of income in the original return. There was a well-reasoned dissent to the decision that the amendment could not relate back to the date of the filing of the original petition.

**(e) PRESENT CASE INVOLVES THE AMOUNT REFUNDABLE  
ON A VALID AND TIMELY REFUND CLAIM.**

It is accordingly not necessary to consider the validity of the reasoning in the *Rieck* and *Dallas* cases, since petitioner here is not seeking a refund by reason of error first assigned more than three years after the payment of the tax, but a refund of the amount covered by a *timely* and *valid* claim for refund asserted prior to the filing of the original petition, and reasserted in that petition which was likewise filed within the statutory period.

(i) Board has confused the requirements of Section 322 (d) of the Internal Revenue Code.

Section 322 of the Internal Revenue Code has heretofore been referred to and quoted. Its provisions are simple, and if followed literally result in the al-

lowance in full of the refund claimed by petitioner. A repetition of these provisions is sufficient to indicate this result.

“If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency,

*the Board shall have jurisdiction to determine the amount of such overpayment,*

and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer.”

Having done this, the amount to be refunded is then determined under the following provision of the subsection:

“No such credit or refund shall be made of *any portion of the tax* unless the Board determines as part of its decision that *such portion* was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency.”

The statute contemplates that in a given instance the amount of overpayment may exceed the amount refundable by its reference in the second sentence to a “portion of the tax”.

Had the Board here first determined the overpayment on the basis of its findings, it would have found



that petitioner had overpaid his income tax for the year 1934 by \$15,122.56. Having so determined, it would then have performed its duty as required by the closing provision of the subsection and determined that \$4,087.61 of that overpayment was paid within three years before the filing of the claim therefor on December 23, 1937. So determining, the refund of that amount is automatically made after the decision becomes final.

- (ii) Petitioner to Board may introduce at the hearing proof in support of any error alleged in his pleadings to reduce or offset the deficiency asserted by respondent.

It has been the uniform practice of the Board to receive at a hearing proof in support of any error alleged in the petition or amended petition in order to determine whether or not there is a deficiency in petitioner's income tax for the period. The Board is expressly given "jurisdiction to redetermine the correct amount of the deficiency". (Internal Revenue Code Sec. 272(e) *supra*.)

In *Appeal of Gutterman Strauss Co.*, 1 B. T. A. 243, the Commissioner contended that the Board could consider only errors in the proposed deficiency urged before the Bureau. The Board said (p. 244):

"But admitting that this claim was not made before the Commissioner, the Board is clearly of the opinion that it has jurisdiction to determine the point in issue. The Commissioner has found a deficiency in tax for the year 1919. It is the duty of this Board to determine whether the

amount found as a deficiency is the correct amount of the deficiency, if any.

\* \* \* \* \*

“This Board was not created for the purpose of *reviewing rulings made by the Commissioner* but was created for the purpose of *determining the correctness of deficiencies in tax* found by the Commissioner. If the deficiency in tax found by him is greater than the true deficiency the Board has authority to decrease it; if it is less than the true deficiency, the Board has authority to increase it. (*Appeal of the Hotel DeFrance Co.*, 1 B. T. A. 28.) If a taxpayer can prove to this Board that he is entitled to a deduction from gross income, the deduction will be allowed even though it has never been claimed by the taxpayer at any hearing had before the Commissioner; otherwise it would be impossible for this Board to determine the correct amount of the deficiency.”

In the *Appeal of Robert P. Hyams Coal Co., Ltd.*, 1 B. T. A. 217, the Board says (p. 220):

“Inasmuch as the deficiencies in tax for each year are before the Board for its review, the Board *takes jurisdiction of the case to consider all points raised for the purpose of reaching the correct amount of the deficiency in tax*, if any, for each of the years under review.” (Italics supplied.)

In fact the refusal of the Board to permit an amendment to the petition raising new issues may be revers-

ible error. The Circuit Court of Appeals for the Second Circuit so held in *International Banding Machine Co. v. Commissioner*, 37 Fed. (2d) 660, where the evidence on the new issue had been received without objection but the Board had denied a motion to amend to conform to proof and refused to consider the error so raised. See also the decision of the Circuit Court of Appeals for the Third Circuit in *Enameled Metals Co. v. Commissioner*, 42 Fed. (2d) 213, where the Board refused leave to file an amendment raising the bar of the statute of limitations and was reversed.

Instances where the Board permitted amendment to the petition to assign additional error will be found in *Appeal of Bear Manufacturing Co.*, 2 B. T. A. 422; *Appeal of Chicago Railway Equipment Co.*, 13 B. T. A. 471, 480, heretofore cited.

Since it is the duty of the Board to determine the amount of overpayment, where there is no deficiency (Internal Revenue Code, Sec. 322(d)), there is no reason why a different rule should apply as to amendments in such a case than applies where the only question is the amount of the deficiency. As has been pointed out, the portion of the overpayment to be refunded is determined by other factors, but the Board must in all cases determine the taxable income upon all the facts presented to it whether by the original petition or by an amended petition properly filed. Having performed this function, it then proceeds to determine the portion of the overpayment refundable under the final sentence of the subdivision.



V. PLEADINGS DO NOT RAISE ISSUE OF BAR OF STATUTE.

It will be noted that the answer to amendment to petition does not raise the bar of the statute, containing only denials. While this was held immaterial in the *Rieck* case, it will be noted that the bar was pleaded in the answer filed in the *Dallas* case.

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VI. SECURITY EXCHANGE REGISTRATION FEE NOT CLAIMED AS AN ALLOWABLE DEDUCTION BY PETITIONER.

In order to avoid confusion, there has been ignored throughout the discussion of the point involved, the effect on the amount of tax refundable resulting from the fact that there was included in the refund claim filed December 23, 1937, a claim for a deduction of \$80 representing "securities exchange registration fee", which was not conceded to be a proper deduction by the Commissioner. It is not contended by petitioner that the amount should be allowed as a deduction and the recomputation necessary in the event of reversal can give effect thereto.

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**CONCLUSION.**

It is submitted, in conclusion, that the Board has erred in not following the specific directions of Section 322(d) of the Internal Revenue Code; and the Board having found that there was no deficiency in petitioner's income tax for the year 1934, it should have determined the amount of overpayment, viz.,

\$15,122.56, and then it should have determined that \$9,474.40 thereof was paid on December 16, 1935, within three years of the filing of the refund claim for \$4,087.61 on December 23, 1937.

The failure of the Board to follow this simple procedure requires a reversal.

Dated, San Francisco,  
January 3, 1941.

Respectfully submitted,  
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